

L. ELECTRONIC MONITORING

Absent exigent circumstances, the Alaska Constitution requires police to obtain a warrant prior to the surreptitious seizure (by recording) of a conversation. This is commonly referred to as a Glass warrant, the name taken from the case that mandates this type of warrant. Generally, undercover officers who, in some instances, use informants to obtain evidence against a suspect handle these types of cases.

The Court has ruled that the expectation of privacy does not apply when a subject knowingly talks to a police officer and the officer may, without the subject's knowledge or consent, record conversations during the arrest process.

During a custodial interview, you must record the entire conversation. The criteria are: (1) in custody and (2) at a place of detention. A place of detention could be a police vehicle, corrections facility, or police station.

Alaska State Statute 42.20.310 addresses "eavesdropping" by third parties on telephone conversations, and explicitly states that law enforcement officers are not exempt. The interpretation of this statute, combined with the constitutional safeguards as outlined in the Glass decision, mandates that a warrant must be obtained prior to recording a telephone conversation unless exigent circumstances exist. Party consent is not sufficient. However, if a witness is providing a statement by telephone then his/her permission should be asked prior to recording.

ELECTRONIC MONITORING **SELECTED CASES**

State v GLASS (Participant Monitoring) bulletin no. 16. An undercover informant used by the police to make drug buys surreptitiously recorded the defendant's conversation. The Court ruled that a person engaged in private conversation has an expectation of privacy in the conversation and the police may not seize (by recording) the conversation without a warrant. As in other search and seizure contexts, the requirement of a warrant may be circumvented if exigent circumstances exist.

State v AVERY (Recording of Inmates Telephone Calls) bulletin no. 343. It is the Department of Corrections (DOC) policy, which is required by Alaska State Statutes 33.30.231(c), to monitor the phone calls of prisoners. Calls between an attorney or the office of the Ombudsman are exempted. In this case, AVERY was making telephone calls from jail to intimidate a witness/victim from testifying at grand jury. Police obtained a search warrant to seize the calls. Calls had already been recorded and retained by DOC. AVERY argued (citing GLASS v State) that the State was required to get a warrant to initially record the calls. The Court of Appeals ruled that (citing QUINTO v State) that AVERY should have been reasonably aware that his calls were being recorded. There were signs posted above the prisoner telephones that calls were subject to being monitored and a warning that the call was subject to being recorded was played on the phone prior to the call being made.

State v MURTAUGH (Parts of the Victim Right Act of 1991 Declared Unconstitutional) bulletin no. 323. Although defense representatives are required to identify themselves when interviewing victims or witnesses, they are no longer required to inform the person being interviewed that they are surreptitiously tape recording their conversation. Witnesses and victims have the same right to decline to be interviewed either by the police or the defense. Witnesses do not "belong to either party."

State v THORNTON (Warrantless Seizure of Telephone Conversation) (no bulletin). Absent consent of both parties, a Glass warrant is required in order to seize a conversation conducted by telephone.

JONES v State (Describing Place Where Conversation is to be Seized) bulletin no. 57. It is not required that the location where a recorded conversation is to take place be produced in the process of obtaining a Glass warrant. If the defendant invites a police informant into his residence, then he has given his consent to enter. It is not required that a copy of the affidavit or inventory be left at the scene by the undercover police officer after the conversation has been seized. The police are granted a time period of up to 90 days to make a "return" on electronic surveillance warrants.

O'NEILL v State (Third Parties Have No Expectations Of Privacy) bulletin no. 79. Although the conversations of the arrestee and witnesses were recorded without their knowledge or consent, the expectation of privacy did not exist because all parties were knowingly talking with police officers. Seizure of these conversations was incident to arrest.

Juneau v QUINTO (No Expectation of Privacy When Talking to Police) bulletin nos. 83 & 72. In talking with a uniformed police officer, the subject did not have an expectation of privacy that the conversation would not be recorded. In this case, there was not any doubt (unlike Glass, an undercover officer) that the subject was conversing with a police officer.

PALMER v State 604 P 2d 1106 (no bulletin). The defendant in the process of performing breath test and other sobriety tests was videotaped. Since he knowingly talked to police officers, he was not entitled to be informed of the video (warned). Although he was not informed, he was not denied due process or fundamental fairness.

STEPHAN and HARRIS v State (Mandatory Recording of Statements From Persons in Custody) bulletin no. 99. Recording of the entire, not part, of the interview was required since the interview was conducted at place of detention. This ruling was based on the Alaska Constitution, which provides for more individual rights than the U.S. Constitution.

STATE v Amend: (Mandatory Recording Not Required For Arrested Person Who is Not In Custody) bulletin no. 353. Kenai Police arrested Amend for shoplifting. During the search incident to that arrest police discovered drugs. Amend, who had been given Marinda warnings at the time of his arrest, made statements as to where he got the drugs and for what purpose. The officer did not have his recorder on at the time of the Marinda warning and during the interview. Amend argued that the statements must be suppressed because the officer failed to record the statements. The Court of Appeals agreed, however, the Alaska Supreme Court reversed ruling that the statements were admissible because police are not required to record for a person who is not in custody at a place of detention.

MCLAUGHLIN v. State (Entrapment - Right to Counsel and to Remain Silent) bulletin no. 113. When an officer receives calls from a defendant awaiting trial and returns such calls, the defendant is not protected by Sixth Amendment rights when the defendant, now suspect, embarks on new criminal ventures, especially when the contacts were initiated by the defendant.

JONES v Anchorage (Telephone Trap) bulletin no. 118. A "Glass" warrant is not required to install a telephone trap when the suspect phone caller failed to exhibit any subjective expectation of privacy. Caller left numerous harassing messages on an answering machine.

THIEL v State (Right to Counsel Prior to Commencement of Adversarial Proceeding) bulletin no. 125. A suspect who is not under arrest, formally charged, or seized cannot bar police initiated contact between an informant and the defendant by invoking his right to counsel during an investigative stop. In this case, a "Glass" warrant was obtained to record conversations between the defendant and the informant. During this event, there was no actual interference with the defendant's efforts to consult an attorney nor impairment of the attorney/client relationship.

FOX v State (Seizure of Conversation by Exigent Circumstances) bulletin no. 167. A Glass warrant was obtained to record a cocaine transaction. When the officer arrived at the residence of the person mentioned in the warrant, a different person answered the door and sold cocaine. The recorded transaction was considered an exigent circumstance given the unexpected intervention of the second person.

CARR v State (Miranda/Right to Counsel) bulletin no. 174. Two people who had been living together were both imprisoned for unrelated crimes. A child previously living with the couple reported that the male adult had sexually abused her. A Glass warrant was obtained and the female called the male and incriminating statements were recorded. Both were still imprisoned and later the male made additional incriminating statements in a face-to-face interview with troopers with proper MIRANDA warnings. The initial conversation did not amount to MIRANDA custody because the circumstances were such that: 1) there were no inherently compelling pressures at work to undermine the individuals will to resist and compel him to speak where he would not otherwise do so freely; 2) the circumstances were not present where a reasonable person would not feel free to leave or break off the conversation; 3) incarceration alone does not automatically trigger MIRANDA; and 4) the male was not under any degree of compulsion to take the call and not inhibited from terminating the call. The interaction of custody and official interrogation was not coercive in this situation. The second issue related to whether the male's right to counsel was violated since an attorney for the related child custody issues represented him. In this case, 1) the right to counsel is not triggered by purely investigative efforts since the suspect had not been accused at this point; and 2) the right to counsel is case specific and the child custody issue was not sufficiently related to the assault case.

State v PAGE (Surreptitious Use of Video Monitoring In Private Residence) bulletin no. 198. When a person engages in a conversation that is protected from electronic monitoring, police are required to obtain a Glass warrant for video monitoring, even if they turn the sound off when the camera is placed inside a private residence where there is a reasonable expectation of visual privacy.

KYLLO v U. S. (Use of Thermal Imaging Is A Search – Not Plain View) bulletin no. 250. Federal agents suspected KYLLO had a "grow operation" going on in his residence. He lived in a triplex. The agents scanned his residence with a thermal imaging device. The device indicated that the residence was "hot." A

search warrant was obtained and evidence collected. The court said that using this device consisted of an intrusion into a constitutionally protected area.

U.S. v Jones, Antoine. (Warrantless attachment of GPS to monitor Vehicle violates Fourth Amendment) bulletin no. 358. While Jones's vehicle was parked in a public parking lot Government agents attached a GPS device to the undercarriage of the vehicle. Over a 28-day period the government collected 2000 pieces of information as to where the vehicle had been. Using this information as a part of their investigation Jones and a number of co-conspirators were arrested and convicted of a number of drug charges. Jones argued that the government violated his Fourth Amendment Right by making the warrantless installation of the device. The U.S. Supreme Court agreed ruling: The government in this case occupied private property (the vehicle) for the purpose of obtaining information. The Fourth Amendment protects people, not places, and that Jones had a reasonable expectation of privacy insofar as his vehicle was concerned.

State v COWLES (Covert Video Monitoring) bulletin no. 256. UAF police installed a concealed camera above the desk of COWLES whose office was a ticket booth where she accepted money. They caught her stealing. Because her office was in view of the public and she shared space with a co-worker she had no expectations of privacy.

McGEE v State (Probable Cause Required To Seize Package For Itemiser "Sniff Test") bulletin no. 257. Police lacked probable cause when they intercepted a FedEx package to submit it to an itemiser "sniff test."

State v BOCESKI (Glass Warrant Required For Surreptitious Eavesdropping; Overhead Conversation Admissible So Long As Officer In Place Where He Has A Right To Be). Bulletin no. 259. NSB Police were in the residence of an informant when they overheard a conversation taking place in the Arctic entryway. The informant had given them permission to be there. The officers had also put a tape recorder in the entryway to capture the conversation – for that they were required to have a GLASS warrant.